

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TERESA GUEVARA,)	
)	No. CV-09-3115-JPH
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	
MICHAEL J. ASTRUE, Commissioner)	
of Social Security,)	
)	
Defendant.)	
)	
)	

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on March 4, 2011 (Ct. Rec. 17, 24). Attorney Thomas Bothwell represents Plaintiff; Special Assistant United States Attorney Willy Le represents the Commissioner of Social Security (Commissioner). The parties have consented to proceed before a magistrate judge (Ct. Rec. 7). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 24) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 17).

JURISDICTION

Plaintiff protectively filed an application for supplemental security income (SSI) benefits on February 27, 2004, alleging disability as of November 4, 2001 (Tr. 69-71). The application was denied initially and on reconsideration (Tr. 33-36, 39-41).

1 At a hearing before Administrative Law Judge (ALJ) Mary Reed
2 on June 22, 2006, plaintiff, represented by counsel, and a
3 vocational expert testified (Tr. 566-599). On March 26, 2007, the
4 ALJ issued an unfavorable decision (Tr. 14-26). The Appeals
5 Council denied Ms. Guevara's request for review on September 21,
6 2009 (Tr. 5-7). Therefore, the ALJ's decision became the final
7 decision of the Commissioner, which is appealable to the district
8 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action
9 for judicial review pursuant to 42 U.S.C. § 405(g) on November 24,
10 2009 (Ct. Rec. 1, 4).

11 **STATEMENT OF FACTS**

12 The facts have been presented in the administrative hearing
13 transcript, the ALJ's decision, the briefs of both plaintiff and
14 the Commissioner, and are briefly summarized here.

15 Plaintiff was 44 years old when she applied for benefits and
16 47 on the date of the ALJ's decision (Tr. 24, 571). She quit
17 school in tenth grade due to pregnancy (Tr. 84, 304). Ms. Guevara
18 has worked as a kitchen helper and hospital cleaner. She stopped
19 working in 2001 after a knee injury and subsequent surgery in 2002
20 (Tr. 78, 327, 572, 580-581, 589-591, 598). Plaintiff testified she
21 is unable to work due to depression, anxiety, leg swelling, and
22 back pain (Tr. 573-574). She binges and purges in an effort to
23 lose weight (Tr. 579-580). Plaintiff lives with her 17 year old
24 son (Tr. 577).

25 During the relevant period reported activities include daily
26 cooking, household chores, sewing, shopping, and visiting family
27 (Tr. 123-124, 172). Plaintiff testified she spends most of the day
28 watching television. She has memory problems and difficulty

1 understanding what she reads. Despite plaintiff's 2001 knee
2 injury, she once walked 36 miles at one time after the injury and
3 found it "refreshing" (Tr. 95, 171). Ms. Guevara testified she
4 smoked marijuana daily until September 2005, was clean from
5 September 2005 until three months before the hearing, and smoked
6 marijuana four days before the hearing (Tr. 581-583).

7 SEQUENTIAL EVALUATION PROCESS

8 The Social Security Act (the Act) defines disability as the
9 as the "inability to engage in any substantial gainful activity by
10 reason of any medically determinable physical or mental impairment
11 which can be expected to result in death or which has lasted or
12 can be expected to last for a continuous period of not less than
13 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act
14 also provides that a Plaintiff shall be determined to be under a
15 disability only if any impairments are of such severity that a
16 plaintiff is not only unable to do previous work but cannot,
17 considering plaintiff's age, education and work experiences,
18 engage in any other substantial gainful work which exists in the
19 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
20 Thus, the definition of disability consists of both medical and
21 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
22 (9th Cir. 2001).

23 The Commissioner has established a five-step sequential
24 evaluation process for determining whether a person is disabled.
25 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
26 is engaged in substantial gainful activities. If so, benefits are
27 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,
28 the decision maker proceeds to step two, which determines whether

1 plaintiff has a medically severe impairment or combination of
2 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

3 If plaintiff does not have a severe impairment or combination
4 of impairments, the disability claim is denied. If the impairment
5 is severe, the evaluation proceeds to the third step, which
6 compares plaintiff's impairment with a number of listed
7 impairments acknowledged by the Commissioner to be so severe as to
8 preclude substantial gainful activity. 20 C.F.R. §§

9 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P

10 App. 1. If the impairment meets or equals one of the listed
11 impairments, plaintiff is conclusively presumed to be disabled.

12 If the impairment is not one conclusively presumed to be
13 disabling, the evaluation proceeds to the fourth step, which
14 determines whether the impairment prevents plaintiff from

15 performing work which was performed in the past. If a plaintiff is
16 able to perform previous work, that Plaintiff is deemed not

17 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At
18 this step, plaintiff's residual functional capacity (RFC)

19 assessment is considered. If plaintiff cannot perform this work,
20 the fifth and final step in the process determines whether

21 plaintiff is able to perform other work in the national economy in
22 view of plaintiff's residual functional capacity, age, education

23 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),

24 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

25 The initial burden of proof rests upon plaintiff to establish
26 a *prima facie* case of entitlement to disability benefits.

27 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*

28 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is

1 met once plaintiff establishes that a physical or mental
2 impairment prevents the performance of previous work. The burden
3 then shifts, at step five, to the Commissioner to show that (1)
4 plaintiff can perform other substantial gainful activity and (2) a
5 "significant number of jobs exist in the national economy" which
6 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
7 Cir. 1984).

8 STANDARD OF REVIEW

9 Congress has provided a limited scope of judicial review of a
10 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
11 the Commissioner's decision, made through an ALJ, when the
12 determination is not based on legal error and is supported by
13 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9th
14 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
15 "The [Commissioner's] determination that a plaintiff is not
16 disabled will be upheld if the findings of fact are supported by
17 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
18 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is
19 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
20 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
21 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
22 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
23 573, 576 (9th Cir. 1988). Substantial evidence "means such
24 evidence as a reasonable mind might accept as adequate to support
25 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
26 (citations omitted). "[S]uch inferences and conclusions as the
27 [Commissioner] may reasonably draw from the evidence" will also be
28 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On

1 review, the Court considers the record as a whole, not just the
2 evidence supporting the decision of the Commissioner. *Weetman v.*
3 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(*quoting Kornock v.*
4 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

5 It is the role of the trier of fact, not this Court, to
6 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
7 evidence supports more than one rational interpretation, the Court
8 may not substitute its judgment for that of the Commissioner.
9 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
10 (9th Cir. 1984). Nevertheless, a decision supported by substantial
11 evidence will still be set aside if the proper legal standards
12 were not applied in weighing the evidence and making the decision.
13 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
14 433 (9th Cir. 1987). Thus, if there is substantial evidence to
15 support the administrative findings, or if there is conflicting
16 evidence that will support a finding of either disability or
17 nondisability, the finding of the Commissioner is conclusive.
18 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

19 ALJ'S FINDINGS

20 At step one the ALJ found plaintiff did not engage in
21 substantial gainful activity after onset (Tr. 16). At steps two
22 and three, she found plaintiff suffers from obesity, borderline to
23 low average intellectual functioning, mild depressive disorder,
24 post right knee surgery, and drug and alcohol abuse (DAA),
25 impairments that are severe but do not meet or medically equal a
26 Listed impairment (Tr. 16, 18). The ALJ found plaintiff less than
27 completely credible (Tr. 20-21). At step four, relying on the VE,
28 she found plaintiff's RFC for a range of medium work precludes any

1 past relevant work (Tr. 24, 146). At step five, again relying on
2 the VE, the ALJ found plaintiff can work as a dining room
3 attendant, sandwich maker, vehicle washer, and campground
4 attendant (Tr. 25, 146-147). The ALJ found plaintiff has not been
5 disabled as defined by the Social Security Act at any time from
6 onset through the date of the decision, March 26, 2007 (Tr. 26).

7 **ISSUES**

8 Plaintiff contends the ALJ erred when she weighed the medical
9 evidence and assessed credibility, should have found she meets
10 Listing 12.05C, and erroneously found there are a number of jobs
11 she can do (Ct. Rec. 18 at 8-21). The Commissioner asks the Court
12 to affirm, asserting the ALJ's decision is supported by
13 substantial evidence and free of legal error (Ct. Rec. 25 at 1-2).

14 **DISCUSSION**

15 **A. Psychological limitations**

16 Plaintiff asserts the ALJ failed to properly credit the
17 opinions of examiners Santosh Agnani, M.D., and Jay M. Toews,
18 Ed. D., treating psychiatrist Jonathan Lee, M.D., and several
19 treating therapists (Ct. Rec. 18 at 9-19). The Commissioner
20 answers that the ALJ gave specific, legitimate reasons supported
21 by substantial evidence for the weight she gave these contradicted
22 opinions (Ct. Rec. 25 at 15-16, 17-18).

23 Before onset, in August 2001¹, plaintiff was assessed at
24 Comprehensive Mental Health (CMH)(Tr. 302). She attended one
25 therapy session and did not return until five months later, in
26

27 ¹The date of onset is the date plaintiff applied for SSI
28 benefits, February 27, 2004 (Tr. 14, 26).

1 January 2002 (Tr. 312, 327). At CMH, Dr. Lee supervised medication
2 management while Laurel Wetzal, BA, served as case manager and
3 Diane Anthony, MS, provided counseling. On June 1, 2004, Dr. Lee
4 notes plaintiff's diagnoses are PTSD and depressive disorder NOS.
5 On the same date he turned over plaintiff's medication management
6 to Shawn Martini, M.D. (Tr. 363).

7 Also before onset, in April 2002, Dr. Agnani examined
8 plaintiff. He diagnosed major depression with psychotic features,
9 post-traumatic stress disorder (PTSD), chronic, an eating disorder
10 NOS, and alcohol dependence in early remission (Tr. 329). He did
11 not perform testing. Dr. Agnani notes in the past plaintiff has
12 refused to take prescribed psychotropic medications (Tr. 328

13 In 2003 and February 2004, treating therapist Ms. Anthony
14 opined plaintiff suffers marked limitations in the ability to
15 understand, remember, and follow complex instructions; learn new
16 tasks; exercise judgment and make decisions; relate appropriately
17 to co-workers and supervisors; interact appropriately in public
18 contacts; tolerate the pressures and expectations of a normal work
19 setting, and care for hygiene and appearance. Plaintiff exhibited
20 paranoid behavior and difficulties with cognitive processing (Tr.
21 290, 294-295).

22 In August 2004, Ms. Wetzal diagnosed PTSD and major
23 depressive disorder with psychotic features, and assessed marked
24 and moderate limitations (Tr. 297). In March 2005, she made the
25 same diagnoses and recommended approval for SSI benefits (Tr.
26 501). Symptoms included fatigue, sleep disturbance, poor appetite
27 with bingeing, poor concentration, decreased tolerance for
28 stressful situations, difficulty making decisions, low self-

1 esteem, and flashbacks of trauma (Tr. 501).

2 In August 2005, therapist Donalyn Hammer, MS, opined
3 plaintiff's impairments prevented her from working (Tr. 502).

4 After the hearing, in September 2006, Dr. Toews evaluated
5 plaintiff (Tr. 505-523). He diagnosed depressive disorder, NOS
6 with situational components, mild; borderline intellectual
7 functioning; probable malingering; active marijuana abuse, and
8 polysubstance abuse in reported full remission (Tr. 513). Dr.
9 Toews assessed moderate limitations, including plaintiff's ability
10 to complete a normal workday or workweek², and a GAF of 60 (Tr.
11 513-514).

12 The ALJ considered the opinion of psychologist Allen
13 Bostwick, Ph.D., who reviewed the record and gave his opinion (Tr.
14 17, 529, 532-560). Dr. Bostwick assessed no limitation in
15 plaintiff's ability to complete a normal workday or workweek,
16 contrary to Dr. Toews' assessment (Tr. 558).

17 To aid in weighing the conflicting medical evidence, the ALJ
18 evaluated plaintiff's credibility and found her less than fully
19 credible. Credibility determinations bear on evaluations of
20 medical evidence when an ALJ is presented with conflicting medical
21 opinions or inconsistency between a claimant's subjective
22 complaints and diagnosed condition. *See Webb v. Barnhart*, 433 F.3d
23 683, 688 (9th Cir. 2005).

24 Plaintiff asserts the ALJ erred when she found her less than
25

26 ²Dr. Toews assessed two additional moderate limitations: in
27 the ability to work near others, and to interact appropriately
28 with the public (Tr. 514-515). The ALJ's RFC includes limitations
in these areas (Tr. 19).

1 fully credible (Ct. Rec. 18 at 10-15).

2 The Commissioner answers the ALJ's credibility assessment is
3 correct because there is evidence of malingering; in addition, the
4 ALJ correctly relied on plaintiff's inconsistent statements, lack
5 of objective medical evidence for reported physical symptoms, and
6 daily activities (Ct. Rec. 25 at 6-12). Citing *Carmickle v. Comm'r*
7 *of Soc. Sec. Admin.*, 533 F.3d 1155, 1162-1163 (9th Cir. 2008), the
8 Commissioner asserts minor deviations in plaintiff's statements
9 about the frequency of past abuse, even if erroneously considered
10 inconsistent statements by the ALJ, do not require reversal
11 because the remaining factors are valid and based on substantial
12 evidence (Ct. Rec. 25 at 11-12).

13 The Commissioner is correct.

14 It is the province of the ALJ to make credibility
15 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
16 1995). However, the ALJ's findings must be supported by specific
17 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
18 1990). Once the claimant produces medical evidence of an
19 underlying medical impairment, the ALJ may not discredit testimony
20 as to the severity of an impairment because it is unsupported by
21 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
22 1998). Absent affirmative evidence of malingering, the ALJ's
23 reasons for rejecting the claimant's testimony must be "clear and
24 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).
25 "General findings are insufficient: rather the ALJ must identify
26 what testimony not credible and what evidence undermines the
27 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
28 *Shalala*, 12 F.3d 915, 918 (9th Cir. 1993).

1 Here, although there is evidence of malingering, the ALJ
2 additionally gave clear and convincing reasons for her credibility
3 assessment. ALJ Reed relied, in part, on malingering, inconsistent
4 statements, lack of objective evidence, and activities
5 inconsistent with claimed severe impairment, when she found
6 plaintiff less than completely credible (Tr. 17, 21).

7 *Malingering.* Dr. Toews diagnosed probable malingering based
8 on test results (Tr. 513). Allen Bostwick, Ph.D., reviewed Dr.
9 Toews' report and opined MMPI-2 results were "patently invalid"
10 and highly consistent with malingering of psychopathology (Tr.
11 537-538). Plaintiff's counsel asserts one of the tests Dr. Toews
12 relied on, the Rarely Missed Index (RMI), is an unreliable
13 indicator of malingering (Ct. Rec. 18 at 10-12). In support,
14 counsel cites two studies.

15 Counsel misapprehends the Court's role. The Court's role on
16 appeal is to determine if the ALJ applied the correct legal
17 standards and if substantial evidence supports her decision. The
18 record contains evidence affirmatively suggesting that plaintiff
19 was malingering. The ALJ did not err. *See Dodrill v. Shalala*, 12
20 F.3d 915, 918 (9th Cir. 1993)(clear and convincing reasons
21 required when there is no evidence affirmatively suggesting that
22 the claimant was malingering).

23 *Inconsistent statements.* The ALJ observes plaintiff has
24 inconsistently reported her drug use (Tr. 17, 21). See e.g., in
25 November 2001, previous history of drug abuse reported, no use
26 currently (Tr. 197); in February 2003, clean four months (Tr.
27 336); in September 2005, proud underwent treatment for marijuana
28 abuse and clean 30 days (Tr. 404), and, in September 2006, used

1 drugs and alcohol heavily until 2002 (Tr. 506). The ALJ notes
2 plaintiff's testimony she has been going to CMH for 12 years is
3 incorrect (Tr. 20). Records reflect plaintiff obtained treatment
4 there 1994-1995, returned for one session in 2001, and attended
5 sporadically thereafter (Tr. 32). A claimant's inconsistent
6 statements support a decision by the ALJ that a claimant lacks
7 credibility. *Thomas v. Barnhart*, cite; *Nyman v. Heckler*, 779 F.2d
8 528, 531 (9th Cir. 1986).

9 *Lack of objective evidence.* The ALJ points out the objective
10 evidence does not support plaintiff's subjective complaints (Tr.
11 21). Although lack of medical evidence cannot form the sole basis
12 for discounting pain testimony, it is a factor the ALJ can
13 consider when analyzing credibility. *Burch v. Barnhart*, 400 F.3d
14 676, 680-681 (9th Cir. 2005). The ALJ is correct. Exams reveal no
15 joint deformity or neurological deficits, despite claimed
16 disabling limitations (Tr. 366, 368, 395, 398-404).

17 *Activities.* Plaintiff has reported activities during the
18 relevant period have included sewing, cooking, shopping, visiting
19 relatives, and household chores. Significantly, as noted, after
20 suffering a knee injury, Ms. Guevara walked 36 miles (Tr. 21; 171-
21 172, Ex. 2F).

22 It is well-established that the nature of daily activities
23 may be considered when evaluating credibility. *Fair v. Bowen*, 885
24 F.2d 597, 603 (9th Cir. 1989). Plaintiff's activities are
25 consistent with the ability to perform work-like tasks.

26 The ALJ's reasons for finding plaintiff less than fully
27 credible [in addition to evidence of malingering], are clear,
28 convincing, and fully supported by the record. See *Tommasetti v.*

1 Astrue, 533 F.3d 1035, 1039 (9th Cir. 2008)(an ALJ may base an
2 adverse credibility determination on "ordinary techniques of
3 credibility evaluation," "unexplained or inadequately explained
4 failure to seek treatment or to follow a prescribed course of
5 treatment," and "the claimant's daily activities")(citation
6 omitted). The ALJ's credibility determination was supported by
7 substantial evidence. See *Thomas v. Barnhart*, 278 F.3f 947, 959
8 (9th Cir. 2002)(claimant's inconsistent statements to doctors
9 properly considered when determining credibility). Although the
10 evidence supports more than one rational interpretation, the Court
11 may not substitute its judgment for that of the Commissioner
12 where, as here, proper legal standards were applied in weighing
13 the evidence and making the decision. See *Browner*, 839 F.2d at
14 433; *Sprague*, 812 F.2d at 1229-1230.

15 The ALJ rejected examining doctor Agnani's opinion because
16 very little in the way of objective abnormalities are noted, the
17 difficulties he notes are based on plaintiff's unreliable self-
18 report, and despite dire self-reported symptoms, she is noted to
19 be alert and oriented (Tr. 23, 328).

20 The ALJ observes Dr. Lee appeared to rely on plaintiff's
21 unreliable self report because, as with Dr. Agnani's report,
22 "very little in the way of objective abnormalities are noted" (Tr.
23 23). In 2004, he described plaintiff as alert and cooperative
24 "with no delusions or hallucinations." Plaintiff says she is
25 tired, irritable, and has mood swings. Dr. Lee diagnosed
26 depressive disorder NOS and PTSD (Tr. 23, Ex. 10F). The ALJ points
27 out several months later, plaintiff reports hearing voices and
28 "being clean and sober for 2.5 years." Dr. Lee's only observed

1 abnormality is "slightly depressed mood" (Tr. 23, Ex. 10F/76). In
2 addition, the ALJ observes later testing casts doubt on
3 plaintiff's credibility, undermining assessments based on
4 unreliable self-reports (Tr. 23).

5 An ALJ can reject a treating physician's opinion if it is
6 "brief, conclusory, and inadequately supported by clinical
7 findings." *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir.
8 2002)(citations omitted). The ALJ may properly reject opinions
9 based on a claimant's unreliable self-report. See *Andrews v.*
10 *Shahala*, 53 F.3d 1035, 1043 (9th Cir. 1995). The ALJ's reasons for
11 rejecting Drs. Lee and Agnani's contradicted diagnoses are
12 specific, legitimate and supported by substantial evidence.

13 The ALJ gave little weight to Ms. Wetzel's opinion because it
14 was not based on objective testing, she is not an acceptable
15 source as defined by the Act³, her opinion again appears to be
16 based largely on plaintiff's unreliable self-report, and other
17 medical sources contradict her opinion (Tr. 23). The ALJ rejected
18 Ms. Hammer and Ms. Anthony's opinions for the same reasons (Tr.
19 23; Tr. 288-295).

20 Citing *Gomez v. Chater*, 74 F.3d 967, 971 (9th Cir. 1996),
21 plaintiff argues treating therapists should be evaluated under the
22 standard of a treating physician because they are part of an
23 "interdisciplinary team." Plaintiff is incorrect. The Social
24 Security Regulation relied upon in the *Gomez* ruling (20 C.F.R. §
25 416.913(a)(6)) has been amended and no longer includes

26
27 ³By definition, only an acceptable medical source is
28 qualified to diagnose a disabling impairment. 20 C.F.R. §§
404.1527(d), .1513(d), 416.927(d), .913(d).
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1 "interdisciplinary team," under the definition of "acceptable
2 medical sources." See 20 C.F.R. §§ 404.1513(a)(1-5), 416.913(a)(1-
3 5). *Gomez* is not apposite. The opinions of the therapists are lay
4 witness opinions.

5 Lay testimony as to a claimant's symptoms is competent
6 evidence that an ALJ must take into account, unless he or she
7 expressly determines to disregard such testimony and gives reasons
8 germane to each witness for doing so. *Lewis v. Apfel*, 236 F.3d
9 503, 511 (9th Cir. 2001), citing *Nguyen v. Chater*, 100 F.3d 1462,
10 1467 (9th Cir. 1996)(internal citation omitted).

11 ALJ Reed's reasons for rejecting the treating therapists'
12 opinions are specific and "germane" to each. See *Andrews*, 53 F.3d
13 at 1043 (an ALJ may properly discount a diagnosis based on
14 unreliable self-report); *Thomas*, 278 F.3d at 957 (an ALJ may
15 properly reject an opinion that is inadequately supported by
16 clinical findings).

17 The ALJ rejected Dr. Toews' assessed moderate limitation in
18 the ability to complete a normal workday or workweek, in part
19 based on Dr. Bostwick's opinion. Dr. Bostwick, uniquely, was able
20 to review plaintiff's entire history. Further, Dr. Toews diagnosed
21 probable malingering. The ALJ opines it is unclear to what extent
22 his assessed limitations are attributable to probable malingering,
23 rather than a recognized impairment, since Dr. Toews opined he
24 assessed limitations due to plaintiff's "victim orientation" and
25 "poor motivation" (Tr. 22). The ALJ elected instead to assess
26 limitations greater than those indicated by Dr. Toews (proffered
27 by Dr. Bostwick) in some areas, giving plaintiff the benefit of
28 the doubt (Tr. 22).

1 It is the role of the trier of fact to resolve conflicts in
2 evidence. *Richardson v. Perales*, 402 U.S. 389, 401 (1971). The ALJ
3 acted in accordance with her responsibility to determine the
4 credibility of the medical evidence, and she gave specific,
5 legitimate reasons for discrediting particular opinions. See
6 *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992);
7 *Magallanes v. Bowen*, 881 F.2d 747, 751-752 (9th Cir. 1989).

8 The ALJ properly weighed the medical evidence of
9 psychological limitations and plaintiff's credibility.

10 **B. Step three - Listing 12.05C**

11 Plaintiff asserts ALJ Reed erred when she found Ms. Guevara's
12 impairments do not meet the requirements of Listing 12.05C, mental
13 retardation (Ct. Rec. 18 at 9-10). The Commissioner answers that
14 the ALJ is correct, in part because plaintiff fails to meet her
15 burden of showing purported mental retardation began before age 22
16 (Ct. Rec. 25 at 19-20).

17 Listing 12.05 defines mental retardation as "significantly
18 subaverage general intellectual functioning with deficits in
19 adaptive functioning initially manifested during the developmental
20 period, i.e., the evidence demonstrates or supports onset of the
21 impairment before age 22." 20 C.F.R. part 404, subpart P, appendix
22 1, Listing 12.05.

23 Subsection C, on which plaintiff relies, requires "[a] valid
24 verbal, performance, or full scale IQ of 60-70 and a physical or
25 other mental impairment imposing an additional and significant
26 work-related limitation of function." (Id.)

27 To meet the requirements of Listing 12.05C, an IQ test must
28 be "valid." 20 C.F.R. part 404, subpart P, appendix 1, Listing

12.05C. The ALJ properly considered and evaluated the opinions of Dr. Toews and Dr. Bostwick, and determined that plaintiff's IQ score of 69 was not "valid." As the ALJ noted, Dr. Toews assessed probable malingering and cautioned intellectual test results should be viewed with skepticism (Tr. 22, 510-513). Dr. Bostwick pointed out plaintiff's average to low average range scores on the Wechsler Memory Scale-III, a test highly correlated with intellectual functioning, contradicts Listing level impairment (Tr. 18, Ex. 21F). These are specific and legitimate reasons for discrediting plaintiff's IQ score and finding her impairment does not meet the Listing's criteria. See *Andrews v. Shalala*, 53 F.3d 1035, 1042 (9th Cir. 1995); *Magallanes v. Bowen*, 881 F.2d 747, 753 (9th Cir. 1989). In addition, plaintiff states she completed "special job training, trade or vocational school," a nursing class, in 1998 (Tr. 84). The ALJ came to a reasonable conclusion based on the evidence in the record, and that ends the court's inquiry on appeal. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n. 1 (9th Cir. 2005) ("If the record would support more than one rational interpretation, we defer to the ALJ's decision.").

C. Physical impairments

Plaintiff alleges the ALJ erred when she assessed an RFC for a range of medium exertion work (Ct. Rec. 18 at 19-20). First, according to the Commissioner, the ALJ's RFC assessment is supported by examining doctor Chester McLaughlin, M.D.'s 2003 RFC for "light to medium work." Second, the Commissioner points out the ALJ's RFC is supported by the opinion of treating doctor Theodore Palmatier, M.D., who concurred in Dr. McLaughlin's opinion (Ct. Rec. 25 at 16-17, citing Tr. 194, 269).

1 The Commissioner is correct.

2 In November 2001 plaintiff suffered a right knee sprain. She
3 underwent lateral retinacular release on June 26, 2002 (Tr. 178,
4 269). The ALJ notes Dr. Palmatier "opined that she could work as a
5 care giver and not do heavy work," consistent with an RFC for
6 medium work (Tr. 24, 269). In the same report, Dr. Palmatier
7 inconsistently released plaintiff to "permanent light duty" and
8 told her "sedentary work is really preferred" (Tr. 269). Plaintiff
9 told him she felt it would be therapeutic to return to some type
10 of work (Tr. 269).

11 The ALJ considered Dr. Palmatier's internally inconsistent
12 opinion. She found the evidence supported an RFC for medium work
13 because it is supported both by the IME [in March 2003] and by the
14 treating doctor's April 2003 concurrence in the IME's opinion.

15 The ALJ is responsible for reviewing the evidence and
16 resolving conflicts or ambiguities in testimony. *Magallanes v.*
17 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). It is the role of the
18 trier of fact, not this court, to resolve conflicts in evidence.
19 *Richardson*, 402 U.S. at 400. The court has a limited role in
20 determining whether the ALJ's decision is supported by substantial
21 evidence and may not substitute its own judgment for that of the
22 ALJ, even if it might justifiably have reached a different result
23 upon de novo review. 42 U.S.C. § 405 (g).

24 The ALJ's interpretation of the evidence is reasonable.

25 ALJ Reed found complaints of foot pain not severe. She
26 observes although plaintiff complained of right foot pain, her
27 exam showed no deformity and by the next exam, she was able to
28 ambulate without difficulty. And, after surgery, plaintiff walked

1 36 miles (Tr. 18, 402-403). There is no error.

2 **D. Step five**

3 Plaintiff asserts the RFC and questions to the vocational
4 expert are erroneous. Citing *Stubbs-Danielson v. Astrue*, 539 F.3d
5 1169, 1175-1176 (9th Cir. 2008), the Commissioner observes
6 plaintiff's step five argument is premised on the same issues the
7 court has already addressed, *i.e.*, the weight the ALJ gave the
8 medical and lay evidence (Ct. Rec. 25 at 20). The Commissioner is
9 correct. Step five error is not established simply by restating
10 arguments that the ALJ improperly weighed the evidence. *Stubbs*,
11 539 at 1175-1176.

12 After review the Court finds no harmful error in the ALJ's
13 decision.

14 **CONCLUSION**

15 Having reviewed the record and the ALJ's conclusions, this
16 court finds that the ALJ's decision is free of legal error and
17 supported by substantial evidence..

18 **IT IS ORDERED:**

19 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 24**) is
20 **GRANTED.**

21 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 17**) is
22 **DENIED.**

23 The District Court Executive is directed to file this Order,
24 provide copies to counsel for the parties, enter judgment in favor
25 of Defendant, and **CLOSE** this file.

26 DATED this 4th day of March, 2011.

27 s/ James P. Hutton
JAMES P. HUTTON
28 UNITED STATES MAGISTRATE JUDGE

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